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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

DEC 17 2004

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date:

SRC 97 219 51520
EAC 96 180 51895

IN RE:

Petitioner:
Beneficiary

[REDACTED]

PETITION:

Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a Salvadoran restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered from the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The petition's priority date in this instance is July 7, 1994. The beneficiary's salary as stated on the labor certification is \$10.46 per hour or \$21,756.80 per year.

From the priority date, and including the motion to reconsider, filed late on August 17, 1997, the petitioner has offered in evidence one (1) federal tax return in support of its ability to pay the proffered wage. For the fiscal year from April 1, 1994 to March 31, 1995, the FY 1994 Form 1120, U.S. Corporation Income Tax Return, reported taxable income before net operating loss deduction and special deductions as a (loss), (\$11,016). The petitioner also submitted Financial Statements, dated October 31, 1995. Since these statements are an unaudited compilation report (1995 unaudited financial statements), they have little evidentiary value.¹ The director required additional evidence to establish the petitioner's ability to pay the proffered wage in a request for evidence (RFE), dated June 18, 1996.

The petitioner responded to the RFE with a 1994 Wage and Tax Statement (Form W-2) for \$10,188, less than the proffered wage, paid to one Irma Campos (Campos). Seven (7) weekly payroll stubs of 1996 from Carvas Corporation (Carvas) totaled \$1,680, less than the proffered wage. The petitioner stated that the beneficiary

¹ If the petitioner resorts to financial statements, regulations clearly mandate that they must be audited. See 8 C.F.R. § 204.5(g)(2), *supra*.

would replace Campos.² The petitioner offered, in response to the RFE, a single commercial bank statement in its name, but with the social security number 578-76-8429. It came from American Security Bank, N.A., dated July 29, 1994 (the petitioner's bank statement) and reflected a beginning balance of \$1,172.65 and an ending balance of \$458.05, less than the proffered wage.

The director considered wages and salaries paid, including those to Campos, the compensation of officers, and the inclusion of depreciation in expenses, determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and denied the petition in a decision dated October 1, 1996.

On appeal, counsel presented a brief and contended that the AAO must "add back" to income such expenses as depreciation, amortization, and wages and salaries paid to others, in order to determine the ability to pay the proffered wage. The AAO discussed the judicial authorities and rejected these accounting practices.

Also, the AAO noted, without details, two (2) isolated bank statements presented with the appeal. The AAO could not determine from them whether the petitioner had a sufficient cash flow to pay the proffered wage. The statement from Chevy Chase Bank, dated July 7, 1994, reflected a balance of \$81,280.01 in the account of Eduardo Cartagena, trustee for Edwin and Lidia Cartagena (Cartagena bank statement), with no taxpayer identification number (TIN). The commercial bank account statement from [illegible] Bank dated September 30, 1996, reflected a balance of \$144,846.72 in the account of Carvas Corporation, trading as Tazumal Café (Carvas bank statement), and a TIN, namely, 541778565.³

The AAO weighed the 1995 unaudited financial statements, but concluded that they had no bearing on the petitioner's ability to pay the proffered wage at the priority date. They have little evidentiary value for any purpose.⁴ The AAO dismissed the appeal in a decision dated July 10, 1997 (1997 decision).

The petitioner filed this motion to reconsider because the 1997 decision states that counsel did not submit a brief. Counsel did, and, despite the statement to the contrary, the 1997 decision considers every point and document referenced in that brief on appeal, including the Cartagena and Carvas bank statements. It is evident from the consideration of the bank statements that the AAO had the brief and considered it in the 1997 decision.⁵ An independent review of the evidence for this motion to reconsider, nevertheless, affirms the 1997 decision.

The Cartagena statement relates to a trust account of individuals. The reliance of the petitioning corporation on individuals' trust assets is not convincing. The FY 1994 Form 1120 explicitly states that the petitioner is a corporation. A corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Citizenship and Immigration Services (CIS), formerly the Service or INS, will not "pierce the corporate veil" to consider financial

² The petitioner laid no foundation that Carvas was the petitioner. Also, the petitioner did not establish that the duties of Campos' position corresponded to those exacted of the beneficiary in the Form ETA 750, Part A.

³ This TIN did not correspond to the employer identification number (EIN), 52-1674159, which the petitioner gave on its FY 1994 Form 1120 and casts further doubt on the identity of Carvas as the petitioner. See footnote 2, *supra*.

⁴ See footnote 1, *supra*.

⁵ AAO stamped counsel's brief as received on February 24, 1997, and the AAO issued the 1997 decision on July 10, 1997.

resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

Counsel stipulates that there is no evidence in the record that the petitioner would replace Campos with the beneficiary. The petitioner did not document the number of its employees, notwithstanding the explicit request of the RFE. In any event, salaries and wages, once paid to others, are not readily available to apply to the beneficiary's proffered wage. Also, the petitioner, in 1994, paid Irma Campos \$10,188, less than the proffered wage. Despite counsel's assertion, these lesser wages fail to establish the ability to pay the proffered wage at the priority date or in any year continuing until the beneficiary obtains lawful permanent residence. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel's motion renews the contention that depreciation and amortization deductions are not actual expenses. Counsel infers that the negative taxable income of (\$11,016), reported on the petitioner's FY 1994 Form 1120, is, therefore, a mere "artificial loss." In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd* 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc.*, 623 F.Supp at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

Counsel, finally, insists that the Carvas bank statement demonstrates the petitioner's continuing ability to pay the proffered wage. As already noted, the petitioner laid no foundation that Carvas is the same as the petitioner in the tender of pay stubs for Irma Campos.⁶ Moreover, the 1996 Carvas bank statement identifies the TIN for Carvas as 541778565. In contradiction, the FY 1994 Form 1120 identifies the petitioner's EIN as 52-1674159. First, the petitioner did not demonstrate that they are the same in regard to the alleged commercial bank balance of \$144,846.72 in the Carvas statement. Second, bank statements show only the amount in an account on a single date. The isolated balance offered with the Carvas and the Cartagena bank statements do not permit CIS, or the AAO in its 1997 decision, to ascertain whether sufficient cash flow existed to pay the proffered wage continuing until the beneficiary obtains lawful permanent residence.⁷

Bank statements are not among the types of evidence specified for proof of the ability to pay the proffered wage in 8 C.F.R. § 204.5(g)(2). This regulation allows additional material in "appropriate cases," but the petitioner has not shown that the prescribed documentation is inapplicable, inaccurate, or unavailable.

⁶ See footnote 2, *supra*.

⁷ The AAO particularly noted that limitation in the 1997 decision.

Closer inspection of the evidence in respect the priority date includes an evaluation of Schedule L, the balance sheet, of the FY 1994 Form 1120. Current assets were \$34,754, and they included only \$5,379 of cash. Current liabilities were \$82,650. Current assets and current liabilities appear, respectively, on designated lines of Schedule L. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the given period. The difference of the taxpayer's current assets minus current liabilities was, however, a negative (\$47,896), or net current liabilities.⁸

If the balance reflected on the Cartagena bank statement, \$81,280.01, were an asset of the petitioner, its FY 1994 Form 1120 should have reflected it. Schedule L of the tax return, however, shows \$5,379 of cash.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

No credible evidence supports the ability to pay the proffered wage at the priority date. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reconsider is granted, the previous decision of the AAO is affirmed, and the petition is denied.

⁸ Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. See *Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000).